BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
	)	
	)	

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1100 Pennsylvania Avenue, Suite 603
Post Office Box 684
Washington, D.C. 20044-0684

(202) 898-2200

May 26, 1999

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**

INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.415, 1.419 (1998), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following initial comments addressing the Commission's "Second Further Notice of Proposed Rulemaking" ("FNPRM") adopted April 8 and released April 16, 1999 in the above captioned proceeding.[1] In response to the FCC's FNPRM, NARUC respectfully suggests that the FCC lacks authority to establish a separate procedure to review State network element determinations.

In support of its comments, NARUC states as follows:

I. BACKGROUND

On January 25, 1999, the United States Supreme Court upheld all but one of the FCC's local competition rules that had been challenged in the Eighth Circuit.[2] The Supreme Court rejected, in part, the FCC's implementation of the network element unbundling obligations set forth in § 251(c)(3) of the Telecommunications Act of 1996 ("TelAct"), and vacated § 51.319 of the FCC's rules. Section 51.319 sets forth the minimum set of network elements ("NEs") that incumbent local exchange carriers ("LECs") must make available on an unbundled basis to requesting carriers pursuant to TelAct § 251(c)(3) and § 251(d)(2). The Supreme Court found

---

[1] **See,** "Second Further Notice of Proposed Rulemaking" *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*" adopted April 8, 1999, 64 Federal Register 20238 (April 26, 1999) [CC Docket No. 96-98, FCC 99-70]

[2] **See,** *AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999).

that the FCC, in determining which elements must be unbundled pursuant to § 251(c)(3), had not adequately considered the "necessary" and "impair" standards of § 251(d)(2).

In this proceeding, the FCC has issued a second FNPRM to refresh the record on (1) how the FCC should interpret the § 251(d)(2) standards;[3] and (2) which specific NEs the FCC should require incumbent LECs to unbundled under § 251(c)(3). Other specific issues raised include (1) whether the FCC should continue to identify a minimum list of required NEs, (2) whether States should be allowed to add or subtract from a minimum NE list, and (3) whether the FCC establish a procedure to review State determinations of what NEs an ILEC is required to provide. NARUC did not have an opportunity to pass a resolution to address the issues raised in this proceeding. However, based on several conference calls with the Ad Hoc Telecommunications Committee, one generic position regarding the FNPRM emerged.

II. DISCUSSION

NARUC RESPECTFULLY SUGGESTS THAT THE FCC LACKS AUTHORITY TO ESTABLISH A SEPARATE PROCEDURE TO REVIEW STATE NE DETERMINATIONS.

In ¶ 14 and 38 of the FNPRM, the FCC requested comments on what circumstances, if any, it should review State decisions. It is not clear that there is a statutory basis for such FCC "appellate" review authority with respect to such State NE determinations under § 252. Certainly, the FNPRM does not discuss or cite any statutory basis for such authority. The statute seems clear in § 252(e)(6) where it delineates the mechanism for review. [4]

---

[3] Section 251(d)(2) provides: "In determining what network elements should be made available for subsection (c), the Commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

[4] While there are outstanding 11th amendment challenges to this provision, so far, the majority of district court decisions construing the Act have found that Congress intended the § 252(e)(6) remedy to be exclusive. **See**, e.g., *In Michigan Bell Telephone Co. v. MFS Intelenet*, 16 F. Supp. 2d 819, 823-824, (W.D. Mich. 1998), "Congress has created a unique framework which, while inviting State commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure federal requirements." *Accord, U.S. West v. Hix*, 986 F. Supp. 14, 17 (D. Colorado 1997*); U.S. West Communications v. TCG Seattle*, 971 F. Supp. 1365, 1370 (W.D. Washington 1997). "The Telecommunications Act . . .expressly states that state commission action is reviewable in federal court and nowhere else. Id. at 1370. The Seventh Circuit, in *MCI v. ICC*, 168 F. 3d 315, 322 (7th Cir. 1999) said, "the statute . . .makes clear that Congress intended to provide for federal court review of any regulatory determination under the section." **Accord**, *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F. 3d 500, 501 (7th Cir. 1998).

That section specifies that "any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 of this title and the regulations thereunder and the standards applicable under this section" See also 47 U.S.C. 252(e)(4), precluding state court review of such cases.

III. CONCLUSION

NARUC respectfully suggests that the FCC refrain from establishing any new mechanisms for review of State UNE decisions.

Respectfully submitted,

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1100 Pennsylvania Avenue, Suite 603
Post Office Box 684
Washington, D.C. 20044-0684

(202) 898-2200

May 26, 1999